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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CLAUDIA COSGROVE,

Petitioner,

v.

SHEARSON LEHMAN BROTHERS,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Section 1 of the Federal Arbitration Act exclude all employment contracts from the coverage of the Act, or only employment contracts in the transportation industry?

2. If the Federal Arbitration Act does apply to employment contracts in non-transportation industries, may an employer require a clerical employee to agree at the time of hire, as a condition of employment, that any employment-based claim thereafter arising will be subject to arbitration, and then preclude the employee's access to a judicial forum on the basis of that agreement when a statutory violation later occurs?

3. If the Federal Arbitration Act does apply to employment contracts in non-transportation industries, is such an agreement preclusive when:

(a) the agreement as applied requires the employee to pay $1,600 in arbitration fees as a precondition to securing arbitration;

(b) the agreement does not expressly state that statutory claims are embraced by the arbitration clause, that by agreeing to arbitrate the employee is waiving access to a judicial forum, or that by agreeing to arbitrate the employee is waiving her jury trial right on certain statutory claims;

(c) the agreement as applied yields an arbitration panel composed exclusively of business executives in the employer's industry; and

(d) the agreement as applied yields an arbitration decision rejecting the employee's discrimination claims without any discussion or explanation of the basis for rejecting those claims (thus precluding judicial review for conformity to the statute).

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PETITION FOR A WRIT OF CERTIORARI

Claudia Cosgrove petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review the decision and judgment in *Claudia Cosgrove v. Shearson Lehman Brothers,* 6th Cir. No. 95-3432.

OPINIONS AND ORDERS BELOW

The Order of the United States District Court for the Southern District of Ohio, dated Feb. 11, 1993, staying the lawsuit pending arbitration, is unreported, and is reprinted herein as Appendix E. The award of the arbitration panel of the National Association of Securities Dealers, issued January 28, 1994, dismissing plaintiff's claim, is unreported, and is reprinted herein as Appendix D. The Opinion and Order of the United States District Court for the Southern District of Ohio, dated March 13, 1995, denying plaintiff's motion for relief from the stay, granting defendant's motion to enforce the arbitration award, and dismissing the complaint, is unreported, and is reprinted herein as Appendix C. The Opinion of the United States Court of Appeals for the Sixth Circuit, dated January 6, 1997, affirming the district court, is unreported, and is reprinted herein as Appendix A. The Order of the United States Court of Appeals for the Sixth Circuit, dated March 19, 1997, denying the petition for rehearing en banc, and, treating the petition as one for rehearing before the panel, denying the petition for rehearing, is unreported, and is reprinted herein as Appndix B. The letter apprising that Justice Stevens had extended the time for filing a petition for certiorari in this Court until July 17, 1997, is reprinted as Appendix F.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was filed on January 6, 1997. Petitioner filed a timely "petition for rehearing en banc" on March 19, 1997, which was treated by the Sixth Circuit as a petition for rehearing. Rule 13.3. That court entered

an order reciting that less than a majority of the judges favored granting rehearing en banc, that the petition had also "been referred to the original panel," that the original panel "has further reviewed the petition for rehearing," that the panel had concluded that the issues were fully considered in the original opinion, and that "[a]ccordingly, the petition is denied." (App. 8a). On May 4, 1997, Justice Stevens extended the date for filing a petition for writ of certiorari to July 17, 1997. (App. 27a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 1 and 2 of the United States Arbitration Act, 9 U.S.C. §§ 1, 2, and Section 118 of the Civil Rights Act of 1991, are set out in Appendix G (App. 28a).

STATEMENT OF THE CASE

In 1984, petitioner, Claudia Cosgrove, a high school graduate, applied for and obtained employment as a cashier with Respondent, Shearson Lehman Brothers (Shearson), a brokerage firm. (JA 36).[1] In 1987, following a brief absence from that employment, Ms. Cosgrove again applied for employment with Shearson, this time as a clerical employee. (JA 40, 64). Shearson has a two-page, preprinted employment application form, which provides spaces for applicants to furnish the information usually sought in an employment application, and which then contains several paragraphs of fine print under the heading "Representation by Applicant." The seventh such paragraph provides as follows:

> I hereby agree that any controversy arising out of or in connection with my compensation, employment or termination of employment shall be submitted to arbitration before the National Association of Securities Dealers, Inc., the New York Stock Exchange, Inc., or the American Stock Exchange, Inc., and be resolved in accordance with the rules, then in effect, of such entities. Judgment upon any award rendered by the arbitrators may be entered in any court having

[1] A copy of the Joint Appendix below is lodged with the Clerk.

> jurisdiction thereof. In the event that I fail to abide by these terms, this section shall in no way limit or impair the Company's other legal rights, including the right to enforce said provisions in a court of competent jurisdiction. [JA 93].

Ms. Cosgrove filled out and signed this employment application form on the occasion of both her applications for employment with Shearson (JA 39, 41), and was hired.

In 1991, Ms. Cosgrove filed a charge with the Equal Employment Opportunity Commission alleging that Shearson had retaliated against her because, after she brought to its attention that she had been sexually harassed in the firm's office by one of the firm's brokers, she expressed dissatisfaction with the steps taken by the firm to protect her against further harassment.

The EEOC referred Ms. Cosgrove's charge to the Ohio Civil Rights Commission, which investigated the charge and, on April 2, 1992, issued a letter containing, *inter alia*, the following finding:

> Evidence substantiates that the reasons articulated by Respondent for the negative performance evaluation, resulting in the denial of a merit increase, are pretextual, and that it is probable that Charging Party was denied a merit increase on January 22, 1991, in retaliation for her having raised new concerns regarding sexual harassment. [JA 160].

Settlement negotiations initiated by the Commission failed, and on August 3, 1992, Ms. Cosgrove was issued a Right to Sue Letter. Ms. Cosgrove filed suit on October 30, 1992, in the United States District Court for the Southern District of Ohio, alleging violations of both Title VII and of Ohio Law. (JA 6). Jurisdiction over the Title VII claims was predicated on 28 USC §§ 1331 and 1343; jurisdiction over the state law claims was predicated on diversity of citizenship under 28 USC § 1332 and supplemental jurisdiction under 28 USC § 1367. (JA 6).

The complaint alleged that Ms. Cosgrove had suffered sexual harassment, that she had immediately reported the

incident, that she had later complained of the steps Shearson had taken to protect her against further harassment, that within a month of lodging that complaint she was denied an annual merit increase, that her working conditions were altered to her disadvantage, and that she quit a few months later in circumstances amounting to a constructive discharge. (JA 7-8). The complaint alleged that Shearson's conduct constituted a violation of Title VII and of state civil rights and tort law (JA 9-10), sought, inter alia, compensatory and punitive damages (JA 11), and demanded a jury trial (JA 11).

Shearson filed a motion to dismiss the complaint, or in the alternative to stay proceedings pending arbitration. (JA 29). In support of its motion, Shearson submitted the pre-printed employment applications Ms. Cosgrove had signed when she applied for employment, containing the provision that controversies relating to her employment would be arbitrated. (JA 36-42).

Ms. Cosgrove, in opposing the motion, submitted an affidavit in which she stated, *inter alia*:

> 2. I received no explanation of the arbitration clause in the Employment Applications I signed when I applied for work at Shearson Lehman.
>
> 3. I was not aware when I signed the application that by signing I would be waiving my rights under any federal or state statute. [JA 53].

The district court entered an order in February, 1993, denying Shearson's motion to dismiss, but granting its motion to stay proceedings pending arbitration. (App. 25a).

Under the rules of the NASD, in order to proceed with arbitration Ms. Cosgrove was required to pay $1,400: a non-refundable filing fee of $500 and a hearing session deposit of $900. (JA 103). Ms. Cosgrove then received from NASD a list of potential arbitrators from which the three arbitrators who would constitute the panel in her case were to be selected. Each of the individuals on the list was a broker who had been an executive of a

brokerage firm in the city in which she was employed. In a letter to the NASD Arbitration Department, Ms. Cosgrove's counsel exercised the one peremptory challenge she was allowed, challenged another individual on the list for cause because he was employed by Shearson, and then asked that the list be expanded to include additional names because of

> the inherent unfairness of picking arbitrators from the securities industry community, especially from the securities industry community here in Cincinnati. Not only do these men have a common securities industry identification with the Defendant, but securities industry personnel here in Cincinnati typically know each other.
>
> The composition of this panel is tantamount to having a wrongful discharge case tried by a jury composed solely of employers. The bias of this "Arbitration" is evident from its inception. [JA 98]

The NASD declined to expand the list of proposed arbitrators. Ms. Cosgrove then proceeded to arbitration before a panel of three arbitrators: one had been Executive Vice President and Chief Financial Officer of a brokerage firm in Cincinnati until his recent semi-retirement at which time he became a consultant for the firm (JA 95); a second had been Chairman of the Cincinnati Stock Exchange and until recently Vice President and Branch Manager of the Cincinnati office of a brokerage firm, and was now serving full-time as a registered representative for that firm (JA 96); and the third had until recently been Vice President and Director of a Cincinnati brokerage firm who was now serving as financial consultant for another brokerage firm (JA 97).

The arbitration panel held hearings on two days, following which the arbitrators issued a document that recited the parties' contentions and the relief requested by Ms. Cosgrove, and that contained the following as the full explanation for the panel's decision:

> After considering the pleadings, the testimony and the evidence presented at the hearing, the under-

> signed arbitrators have decided in full and final resolution of the issues submitted for determination as follows:
>
> 1) The Statement of Claim is hereby dismissed in its entirety.
>
> 2) Each party shall bear their respective costs of this action, including attorney's fees. [JA 103].[2]

Following receipt of this award, Ms. Cosgrove returned to the district court and moved for relief from the stay of proceedings (JA 66).

Shearson cross-moved for enforcement of the arbitration award (JA 104).

The district court denied Ms. Cosgrove's motion, granted Shearson's motion, and dismissed the complaint. (App. 9a). The district court refused Ms. Cosgrove's request to reconsider the prior order's conclusion that the dispute was arbitrable; while acknowledging *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), had held on "facts similar to the ones presented by this case . . . that plaintiff had not knowingly and voluntarily waived the right to litigate her statutory civil rights claims," the district court was "no[t] persuaded that *Prudential* represents jurisprudence consistent with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)." (App. 11a). The district court rejected Ms. Cosgrove's contention that the arbitrators' failure to explain their decision freed her to litigate her claims. The court reasoned that *Gilmer* permitted courts to relieve parties of arbitral results only when there was "manifest disregard for the law," and Petitioner could not show from mere silence of the arbitrators that they had disregarded the law. (App. 13a-15a). And the district court rejected Ms. Cosgrove's claim that the arbitration panel was not impartial because its members all were brokers who had

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[2] The document then proceeded to calculate the costs of the proceeding. The total costs came to $3,200. Ms. Cosgrove was assessed half, $1,600; as she had paid $1,400 at the time of filing for arbitration, she was "directed to pay the balance of $200.00 to the NASD, Inc." (JA 103).

recently been executives of brokerage firms in the same city, stating that "the Court refuses to indulge the presumption that members of certain . . . professional groups are prima facie unfit to serve as arbitrators." (App. 16a).

Ms. Cosgrove appealed to the Sixth Circuit.[3] The Court of Appeals affirmed the district court. With regard to the Federal Arbitration Act, the Court of Appeals stated:

> Over the years, there has been some controversy regarding whether the phrase "any other class of workers engaged in foreign or interstate commerce" should be read broadly to exempt virtually all employment contracts from the provisions of the Act, or narrowly, so as to exclude from coverage only employment contracts of workers personally engaged in the movement of goods in interstate commerce. In *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995), this court resolved the issue in favor of the latter interpretation. [App. 2a]

On that basis, the Court of Appeals regarded this Court's decision in *Gilmer v. Interstate/Johnson Lane, supra*, as controlling. And, under *Gilmer*, the Court of Appeals concluded:

> . . . [P]laintiff's claims were properly resolved under the terms of the arbitration agreement she signed unless such traditional grounds for revocation of a contract as fraud or duress are present. See 9 U.S.C. § 2. Since we see no indication in the record of the presence of such defects in the execution of the agreement, we conclude that the district court properly enforced the award. [App. 4a].

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[3] The Equal Employment Opportunity Commission filed a brief *amicus curiae*, arguing that the Federal Arbitration Act does not apply to contracts of employment, and that pre-dispute arbitration provisions extracted by employers from employees as a condition of employment should not bar access to federal court to enforce Title VII. There were in addition four other *amici curiae* briefs filed in the court below. Two supported Petitioner: Brief of the Lawyers Committee for Civil Rights Under Law, and Brief of National Employment Lawyers Association. Two supported Respondent: Brief of Equal Employment Advisory Council and United States Chamber of Commerce, and Brief of Securities Industry Association.

The court below saw no significance in Ms. Cosgrove's claim that she had not understood she was waiving access to a judicial forum for resolving her Title VII claims, because "the plain language of the agreement at issue here makes clear that all employment disputes are to be resolved through arbitration." (App. 4a-5a).

Judge Daughtrey filed a separate opinion, concurring in part and dissenting in part. She agreed that "Title VII claims may, in appropriate situations, be contractually restricted to an arbitral forum." (App. 6a). But she would have remanded the case to the district court "for a finding of whether Cosgrove was indeed aware that she would be waiving her right to bring a Title VII action in federal court merely by applying for a job with Shearson Lehman Brothers." (App. 7a). She reasoned that an arbitration agreement such as this could be enforceable only if both parties are "aware that statutory and constitutional claims, as well as contractual ones, are subject to arbitration;" that here, unlike *Gilmer*, the plaintiff was not an experienced businessperson; that here the employer presented the arbitration clause to Ms. Cosgrove "in a seemingly non-negotiable application for employment;" and that it is "incumbent upon the judiciary to ensure that employees are not unwittingly stripped of" their right to a judicial forum. (App. 6a-7a).

REASONS FOR GRANTING THE WRIT

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23 (1991), the Court answered in the affirmative the question "whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA) can be subjected to compulsory arbitration pursuant to an arbitration agreement in a *securities registration application*." (Emphasis added).

Gilmer has had wide radiating effects beyond the narrow purview of its holding—on employer insistence on including arbitration provisions in employment contracts, on the nature of such provisions, and on the consequences of such provisions for federal court litigation growing out

of employee claims of employer violation of the federal anti-discrimination laws and labor standards laws.

Whether *Gilmer* should have any such effect—more precisely, whether *Gilmer* applies at all to arbitration provisions in *employment* contracts, the first question presented in this case and by this petition—is a question not decided in *Gilmer* and, in recognition of its importance, expressly reserved by the *Gilmer* Court.

The *Gilmer* Court rested its decision in favor of the enforcement of the arbitration clause there on the Federal Arbitration Act [FAA], noting that the FAA provisions manifest a "liberal federal policy favoring arbitration agreements," *id.* at 25, quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), and that "statutory claims may be subject to an arbitration agreement enforceable pursuant to the FAA," 500 U.S. at 26. But, at the same time, the Court noted that there is an *unanswered* question about the FAA's applicability to employment contracts (as distinguished from the securities registration application in *Gilmer*), and accordingly "le[ft] for another day" the task of answering that question. *Id.* at 25 n.2.[4]

The decision in *Gilmer* also rested on the fact that the plaintiff was an "experienced businessman," and left "for resolution in specific cases" whether employees, such as

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[4] On this point, the *Gilmer* Court stated as follows:

> Several *amici curiae* in support of Gilmer argue that § 1 of the FAA excludes from the coverage of the FAA all "contracts of employment." . . . [I]t would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. . . . [T]he arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate [Gilmer's employer]. . . . Consequently, we leave for another day the issue raised by *amici curiae*. [500 U.S. at 25 n.2.]

Justice Stevens, joined by Justice Marshall, dissenting in *Gilmer*, concluded that the contract there was a contract of employment in the securities industry and that such contracts are excluded from FAA coverage. 500 U.S. at 38-41.

Ms. Cosgrove, who cannot possibly be so characterized, have been "coerced" by "overwhelming economic power" into agreeing to arbitration and/or to arbitratrate under ground rules that contain "procedural inadequacies." 500 U.S. at 33. And the Court recognized in *Gilmer* that arbitration cannot be compelled in circumstances that would conflict with congressional intent in the substantive statute at issue, or that would require the claimant to forego substantive rights afforded by the statute. *Id.* at 26.

Despite these careful reservations, *Gilmer* in practice has accelerated the trend whereby employers, as a condition of employment, require employees who are *not* experienced businessmen to sign form contracts of employment that include agreements to arbitrate all employment-related claims, and then stand on the arbitration clause and the FAA as a defense to any later suit alleging that the employer has violated a statute. See *infra*, p. 30.

There is conflict and discord in the courts of appeals about the FAA's application to contracts of employment, and, even on the hypothesis that the FAA applies, conflict as well on the standards that should govern the enforcement of arbitration clauses that have been imposed upon employees as a condition of employment.

Given all this, we submit that the day for this Court to address the questions left open in *Gilmer* has come.

I. ARE CONTRACTS OF EMPLOYMENT IN NON-TRANSPORTATION INDUSTRIES COVERED BY THE FEDERAL ARBITRATION ACT?

As *Gilmer* recognizes, while the FAA applies to agreements to arbitrate in "maritime transactions" and in contracts covering a "transaction involving commerce," the FAA by its terms does *not* apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[5]

[5] The FAA was enacted against a legal backdrop in which states readily enforced *post*-dispute agreements to arbitrate, but resisted enforcing *pre*-dispute agreements to arbitrate. Paul D. Carrington and Paul H. Haagen, *Contract and Jurisprudence*, 1996 Supreme

If—as we believe to be true—the latter provision excludes *all* contracts of employment from the FAA's reach, resolving the conflict on that point would have two effects. First, when the FAA is applicable it preempts state law that would permit judicial resolution of state claims despite an agreement to arbitrate.[6] Thus where, as here, an employee asserts rights under *state* law, inapplicability of the FAA would mean that the employee's entitlement to a judicial forum would be decided as an issue of state law.[7] As most states have antidiscrimination laws that parallel the federal antidiscrimination laws, the scope of the FAA's application (and thus of the FAA's preemptive effect) is a matter of great significance. Second, as to federal statutory antidiscrimination claims, recognition that the FAA excludes contracts of employment would render inapplicable the FAA's "liberal policy favoring arbitration agreements" [8] in determining the availability of a judicial forum.[9] The preclusive effect of arbitration agreements would then be determined exclusively under the aegis of the substantive employee-protective statute at issue.[10]

Court Review 331, 339-40. The effect of the FAA was to reverse the latter rule with respect to contracts within its coverage.

[6] *Southland Corp. v. Keating*, 465 U.S. 1, 10, 12 (1984); *Doctor's Associates, Inc. v. Casarotto*, 116 S.Ct. 1652, 1655-57 (1996).

[7] In the instant case, the parties hotly disputed whether Ohio law would permit litigation of petitioner's state law claims. The court of appeals, having found the FAA applicable, had no occasion to address that issue.

[8] *Gilmer*, 500 U.S. at 35.

[9] *Gilmer* distinguished a prior decision that had refused to treat an arbitration award as precluding litigation of Title VII claims in federal court, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), on the ground, *inter alia*, that *Gardner-Denver* was "not decided under the the FAA." 500 U.S. at 35.

[10] The absence of FAA applicability would not mean that parties could never agree conclusively to resolve a dispute by arbitration. Section 118 of the Civil Rights Act of 1991 "encourages" the use of arbitration "where appropriate and authorized by law." No one disputes that this provision contemplates enforceable *post*-dispute

(A) The courts of appeals are in conflict over the meaning of the clause in the FAA that excludes contracts of employment from its coverage, some holding that the clause excludes all such contracts from coverage and others holding that the exclusion is limited to contracts of employment in the transportation industry.[11] Indeed, it is not overstatement to say that the lower court law on this issue is so confused and convoluted as to be incomprehensible.

The FAA contracts-of-employment coverage question has arisen where arbitration is provided for in a collective bargaining agreement setting employment terms and conditions for a group of employees in an appropriate bargaining unit (as provided for in the National Labor

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agreements to arbitrate. However, the issue of *pre*-dispute commitments to arbitrate extracted as a condition of employment would be subject to resolution by determining the meaning of the 1991 Civil Rights Act term "appropriate." See *infra*, pp. 23-24.

[11] Two pre-*Gilmer* decisions of this Court suggested that the FAA exclusion applies to *all* contracts of employment and not only to those in the transportation industry. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) raised the question of whether federal law authorized specific enforcement of an arbitration clause in a textile mill's collective bargaining agreement. The Fifth Circuit had held that it did not, because the exclusion clause of the FAA rendered that statute inapplicable to contracts of employment. 230 F.2d at 86. This Court reversed, finding federal authority to enforce not in the FAA but rather in federal labor law fashioned from § 301 the Labor Management Relations Act, 29 U.S.C. § 185. Although the FAA was urged as a source of authority for enforcing the arbitration provision, the opinion of the Court did not mention the FAA. Justice Frankfurter, dissenting, saw this as an implicit holding that the FAA did *not* apply to the labor contract at this textile mill. 353 U.S. at 466.

Then, in *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 39-40 (1987), the Court addressed whether an arbitrator committed error by excluding certain evidence tendered by the employer in an arbitration under a collective bargaining agreement covering a paper mill. The Court *analogized* its holding to the one prescribed by the FAA, while seemingly acknowledging that because of the exclusion clause the FAA did not itself apply to the resolution of the dispute. *Id.* at 40 & n.9.

Relations Act and the Railway Labor Act) and, as here, where arbitration is provided for in a contract of employment between an employer and an individual employee in a non-union setting. All of the courts of appeals have spoken to the question in one context or the other, and in some instances in both contexts, with these results:

• The Ninth and Tenth Circuits have expressly held that FAA § 1 excludes *all* collective bargaining agreements from FAA coverage, including those outside the transportation industry, but have not addressed the FAA's application in a case involving an individual's contract of employment.[12]

• The Fourth Circuit has held repeatedly that FAA § 1 excludes *all* collective bargaining agreements from FAA coverage,[13] but in a recent decision has declared that individual contracts of employment are excluded from FAA coverage only in the transportation industry.[14] The Fourth Circuit's recent decision recognizes that individual contracts fall within the term "contract of employment" in FAA § 1 (hence the exclusion for such contracts in the transportation industry), and does not explain how the coverage clause can have a different meaning for individual contracts than for collective bargaining agreements.

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[12] *Kemner v. Dist. Council of Painting Trades*, 768 F.2d 1115, 1118 n.1 (9th Cir. 1985); *American Postal Workers Union v. United States Postal Service*, 861 F.2d 211, 215 n.2 (9th Cir. 1988); *United Food and Commercial Workers v. Safeway*, 889 F.2d 940, 943-44 (10th Cir. 1989); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1454 (10th Cir. 1997). In the Ninth Circuit, the scope of the FAA's exemption for individual employment contracts "remains an open question in this Circuit", *Nelson v. Cyprus Bagdad Copper Corp.*, 1997 WL 381177, *7, n.4 (9th Cir. 1997).

[13] *United Electrical, Radio & Mach. Workers v. Miller Metal Products*, 215 F.2d 221 (4th Cir. 1944); *Domino Sugar v. Sugar Workers Local 392*, 10 F.3d 1064, 1067 (4th Cir. 1993); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996).

[14] *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997).

• The First Circuit has held in its most recent decision that FAA § 1 excludes *all* collective bargaining agreements from FAA coverage,[15] without mentioning an earlier decision in which that court held that individual contracts of employment are excluded from FAA coverage only in the transportation industry.[16]

• The Fifth and Sixth Circuits have held in their most recent decisions that FAA § 1 excludes individual contracts of employment from FAA coverage only in the transportation industry,[17] without mentioning earlier decisions in which those courts held that *all* collective bargaining agreements are excluded from coverage by that same clause.[18]

• The Second and Third Circuits have held with respect to both individual contracts of employment and collective bargaining agreements that the FAA § 1 exclusion is limited to the transportation industry.[19]

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[15] *Posadas de Puerto Rico v. Association de Empleados*, 873 F.2d 479, 482, 484-85 (1st Cir. 1989).

[16] *Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971).

[17] *Rojas v. TK Communications Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Experts Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995).

[18] *Lincoln Mills of Alabama v. Textile Workers*, 230 F.2d 81, 86 (5th Cir. 1956), *rev'd on other grounds*, 353 U.S. 448 (1957); *International Union of Electrical, Radio & Machine Workers v. Ingram Mfg. Co.*, 715 F.2d 886, 889-91 (5th Cir. 1983); *Gatliff Coal Co. v. Cox*, 142 F.2d 876, 882 (6th Cir. 1944); *Occidental Chemical Corp. v. Int'l Chemical Workers Union*, 853 F.2d 1310, 1315 (6th Cir. 1988). Prior to *Asplundh*, the Sixth Circuit had also held individual employment contracts in all industries excluded from FAA coverage. *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310-11 (6th Cir. 1991).

[19] *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (individual contract); *Maryland Casualty Co. v. Realty Advisory Board on Labor Relations*, 107 F.3d 979 ,982 (2d Cir. 1997) (collective bargaining agreement); *Tenney Engineering, Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450 (3d Cir. 1953) (collective bargaining agreement); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997)

• The D.C. and Eighth Circuits have held that with respect to individual contracts of employment the FAA § 1 exclusion is limited to the transportation industry, but have had no cases involving collective bargaining agreements.[20]

• The Seventh Circuit has held that for both collective bargaining agreements and individual contracts of employment the FAA § 1 exclusion is limited to the transportation industry, but that in the case of collective bargaining agreements the application of the FAA is limited to procedural issues and that "federal common law created under the aegis of Section 301 [29 U.S.C. § 185] is used to determine any substantive issues that arise in proceedings to vacate or enforce arbitration awards." [21]

• The Eleventh Circuit has expressly left open the question of the scope of the FAA § 1 exclusion.[22]

(B) On the merits, we submit that the Sixth Circuit position that the FAA applies to contracts of employment generally and that the FAA § 1 exclusion of such contracts covers only the transportation industry is wrong.

The FAA's language and structure plainly do not compel the conclusion that the FAA exclusion clause is limited to the transportation industry. And, there is not so much as a scrap in the legislative materials suggesting the proposition that Congress in amending the FAA bill by adding the "contracts of employment" exclusion intended to draw

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(individual contract). An earlier Second Circuit decision had held that collective bargaining agreements in all industries are excluded. *Harry Hoffman Printing v. Graphic Com. Local 261*, 912 F.2d 608, 613 (2d Cir. 1990).

[20] *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997).

[21] *Prymer v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997), *petition for cert. pending*, No. 96-1830.

[22] *American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 473 (11th Cir. 1987).

a line between arbitration provisions in contracts of employment in the transportation industry and such provisions, e.g., in the manufacturing industry. Indeed, such a distinction would lead to the following counter-intuitive understanding of the FAA: Congress intended to regulate the meaning and effect of arbitration provisions in *all* commercial contracts in *all* industries involving interstate and foreign commerce and to preempt state law in that regard; and, at the same time, Congress intended to regulate arbitration provisions in contracts of employment in the non-transportation industries while leaving the meaning and effect of such provisions in the transportation industry—certainly at the center of interstate and foreign commerce and the federal commerce power—to state law.

The several circuits that have arrived at this unlikely outcome have done so by following the "logic" of two linguistic clues: they have reasoned first, that the references to "seamen and railroad employees" before "any other class of workers engaged in foreign or interstate commerce" leads to the conclusion that only transportation employees are in the term "any other class of workers engaged in . . . commerce;" and second, that the difference in the "commerce" language used to define the FAA's affirmative scope in § 2 ("a contract evidencing a transaction involving commerce"), and in the contracts-of-employment exclusion in § 1 ("contracts of . . . any other class of workers engaged in . . . commerce"), denotes a different, wider scope for the former than the latter.

In the FAA context, this linguistic logic is strained in the extreme. The specific reference to "seamen and railroad employees" in FAA § 1 followed by a general reference ("any other class of workers") parallels the affirmative provision in FAA § 2 providing for enforcement of arbitration agreements in "maritime transactions" and "contracts evidencing a transaction involving commerce." And, no court has read the latter as limited to "maritime"-type transactions. The FAA's affirmative coverage provisions and its "contracts of employment" exclusion provision were, moreover, drafted by different people at different

times, mitigating the significance of the choice of the different "commerce" words in the two provisions. See *infra,* pp. 18-19. And, the different syntactical contexts of the two references meant that use of the same words in both was a grammatical impossibility (transactions do not "engage in" commerce, and classes of workers are not "involving commerce"). Indeed, there is no basis for the proposition that in the legislative lexicon of 1925, "involving commerce" and "in commerce" were terms of art having distinct meanings. In fact, this Court itself used the terms "involving commerce" and "in commerce" interchangeably when discussing the FAA in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967).[23]

The very most that can be said, then, is that the scope of the FAA's "contracts of employment" exclusion is unclear from its bare words. And in this instance, the

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[23] The first issue discussed in *Prima Paint* was whether a commercial consulting contract relating to the sale of a paint factory was embraced by the affirmative provisions of the Act, *viz.*, whether the contract was one "evidencing a transaction *involving* commerce" within the meaning of FAA § 2. 388 U.S. at 400-01 (emphasis supplied). The Court held that it was, stating: "There could not be a clearer case of a contract evidencing a transaction *in* interstate commerce." *Id.* at 401 (emphasis supplied). In *Allied-Bruce Terminex Companies, Inc. v. Dobson,* 513 U.S. 265 (1995), the Court suggested that the phrase "involving commerce" might be broader than "in commerce," but understood the latter phrase to include activities "related to . . . *'the generation of goods and services for interstate markets and* their transport and distribution to the consumer." *Id.* at 273, quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974) (emphasis added).

The phrase "engaged in commerce" also appears in the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 206 and 207. Those provisions apply only to employees who are "engaged in commerce or in the production of goods for commerce." The Court had occasion to construe the "engage in commerce" half of the test in *Mitchell v. Lublin, McGaughy & Associates,* 358 U.S. 207 (1959). The Court held that draftsmen, clerks and stenographers employed by an architectural and consulting engineering firm, who did not produce any goods for commerce, nonetheless were "engaged in commerce."

legislative history leaves no doubt that Congress intended to exclude *all* contracts of employment from the FAA.

The Act was drafted and sponsored by the Committee on Commerce, Trade and Commercial Law of the American Bar Association, acting upon instructions from the ABA to consider and report upon "the further extension of the principle of commercial arbitration." 45 A.B.A. Rep. 75 (1920).[24]

In December, 1992, the ABA Committee's draft of a federal act was simultaneously introduced as a bill in the Senate (S. 4214) and in the House (H.R. 13522). 64 Cong. Rec. 732, 797 (1922). The bill as introduced contained no exclusion clause, and leaders of the Seamen's Union voiced objections that it would apply to employment contracts.[25]

At the hearing on the proposed Arbitration Act before the Senate subcommittee to which the bill was referred, Mr. Piatt, Chairman of the ABA Committee that had drafted the bill, referred to the objection of the Seamen's Union and took pains to make clear that "[i]t was not the intention of this bill to make an industrial arbitration *in any sense*" (emphasis supplied), and added:

> . . . and so I suggest that in as far as the committee is concerned, if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, 'but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.' *It*

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[24] A detailed history of the American Bar Association's efforts in this regard is set forth at 50 A.B.A. Rep. 356-362 (1925).

[25] Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203 (1923). Although voiced by union officials, the objection was not limited to collective bargaining agreements. Indeed, the primary concern was for the impact on individual employment contracts. See, Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 Berkeley J. Emp. & Lab. L. 282 (1996); Matthew W. Finkin, *Employment Contracts Under the FAA—Reconsidered*, 1997 Labor Law Journal 329 (June, 1997).

> *is not intended that this shall be an act referring to labor disputes, at all.* It is purely an act to give *the merchants* the right or the privilege of sitting down and *agreeing with each other* as to what their damages are, if they want to do it. Now, that is all there is in this. [Hearing before a Subcommittee of the Senate Committee on the Judiciary on S. 4213 and S. 4214, 67th Cong., 4th Sess. 9 (1923) (hereafter "Hearing") (emphasis supplied).]

On that same day, Secretary of Commerce Herbert Hoover wrote to the Committee proposing the precise language that ultimately was enacted as the exclusion clause in § 1. His letter began by noting "the urgent need of a Federal *commercial arbitration* act," and continued:

> If the objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." [Hearing at 14].

At the next session of Congress, the bill was reintroduced in both the House and Senate, this time with the exclusionary language that Secretary Hoover had proposed. Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1005 and H.R. 646 (hereafter "Joint Hearings") (68th Cong., 1st Sess.) (1924). The subject matter of the committee hearing on the bills was described as "Arbitration of Interstate *Commercial* Disputes" (*id.* at 1, emphasis supplied), and page after page of the printed record of this hearing reflects the commercial nature of the bill. There was no testimony or suggestion by anyone that the bill was intended in any way to apply to employment contracts. Both the House and Senate reports on the bill are equally devoid of any indication that arbitration of labor or employee disputes was in any way included. H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924); Sen. Rep. No. 536, 68th Cong., 1st Sess. (1924).

On the floor of Congress, the sponsors of the legislation similarly pointed to the bill's exclusively commercial character. Congressman Graham, Chairman of the House Committee on the Judiciary, stated:

> This bill simply provides for one thing, and that is to give an opportunity to enforce an agreement *in commercial contracts and admiralty contracts*—an agreement to arbitrate, when voluntarily placed in the document by the parties to it.
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> * * * *
>
> It creates no new legislation; grants *no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts.* [65 Cong. Rec. 1931 (1924) (emphasis supplied).]

And, later, Congressman Mills of New York, who had introduced the bill in the House, said in response to a request for an explanation of its provisions:

> This bill provides that where there are *commercial* contracts and there is disagreement under the contract, the court can enforce an arbitration agreement in the same way as other portions of the contract. [65 Cong. Rec. 11080 (1924) (emphasis supplied).]

In short, throughout the history of the Act, the clearly expressed intention was to reach only commercial contracts; *no* employment contracts, in *any* industry, were to be covered.

(C) The distinction Congress so clearly recognized and then drew in the FAA between commercial contracts and employment contracts reflects an important reality. The substitution of arbitration for legal proceedings works a major change in enforcement, affecting, in this case, *inter alia,* the right to jury trial and access to discovery. While the decision of business persons to make that choice freely and intelligently merits respect—a respect that the FAA was enacted to afford—that is not obviously true when, as here, an employer extracts an agreement to arbitrate statutory claims from a job applicant for a clerical position as a condition of employment. Indeed, the very premise leading to enactment of statutes conferring sub-

stantive employment rights is that employees cannot adequately protect their important interests in a regime of unregulated free contracting. There is, therefore, every reason for pause before committing to that very regime the dismantlement of the processes established by Congress for vindicating those rights and the substitution of others selected unilaterally by the employer whose conduct the statute is meant to constrain—as the FAA Congress recognized.

II. IF THE FEDERAL ARBITRATION ACT DOES APPLY TO CONTRACTS OF EMPLOYMENT, WHAT CONSTRAINTS DOES THE LAW IMPOSE UPON EMPLOYERS WHO EXTRACT AGREEMENTS TO ARBITRATE AS A CONDITION OF EMPLOYMENT?

As just noted, it continues to be the reality that there is an inherent inequality of bargaining power between business enterprises like Shearson Lehman and applicants for clerical positions like Ms. Cosgrove, and that this inequality manifests itself in form employment contracts prepared by the employer, presented to the employee as a condition of employment, and accepted by the employee as presented. In this context, employers have the power to "structure arbitration in ways that systematically disadvantage employees." *Cole v. Burns International Security Services,* 105 F.3d 1465, 1477 (D.C. Cir. 1997). As Justice Stevens noted in his dissent in *Gilmer,* that kind of free contracting regime would allow "the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts" and to "ma[k]e the foxes guardians of the chickens." 500 U.S. at 42, quoting *Barrentine v. Arkansas-Best Freight Systems, Inc.,* 450 U.S. 728, 750 (Burger, C.J., dissenting).[26]

As the instant case reflects, a number of the lower courts that have ruled that the FAA covers contracts of employ-

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[26] It is precisely this concern that led the Court to conclude that "there can be no prospective waiver of an employee's rights under Title VII." *Gardner-Denver, supra,* 415 U.S. at 51.

ment understand *Gilmer* to have sanctioned just such a regime. But the EEOC and other lower courts read *Gilmer* as a far more nuanced decision that recognized two limits on the preclusive effect of an arbitration agreement (and ensuing arbitration award) that covers statutory claims.

First, FAA § 2—which, as *Gilmer* recognized, provides that agreements to arbitrate are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*"—preserves "generally applicable contract defenses, such as . . . unconscionability," *Doctor's Associates, Inc. v. Casarotto,* 116 S.Ct. 1652, 1656 (1996). And, *Gilmer* left "for resolution in specific cases" contentions that she has been "coerced" by "overwhelming economic power" into agreeing to arbitrate and/or to arbitrate under ground rules that contain "procedural inadequacies." 500 U.S. at 33.

Second, as *Gilmer* recognized, an agreement to arbitrate statutory claims is not preclusive under the FAA if "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985). And, as *Gilmer* noted, this is a statute-by-statute inquiry. "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." 500 U.S. at 26.

If the FAA covers employment contracts, this case presents both the question of whether pre-dispute commitments to arbitrate can be extracted as a condition of employment, and, if so, a series of questions as to what constraints the law imposes to assure that the employer does not opt for a process that "systematically disadvantage[s] employees." *Cole, supra.* On each of these questions, there is either a clearly expressed legislative intention that was ignored by the court below or a conflict in the circuits.

A. Arbitration Imposed as a Condition of Employment

The Equal Employment Opportunity Commission has taken the position, in this case and in others,[27] that pre-dispute agreements to arbitrate statutory claims, extracted as a condition of employment, are *not* preclusive of access by a Title VII claimant to a judicial forum.[28] The EEOC has done so on the ground that Congress set its face against that sort of extracted surrender of the right to bring Title VII claims to the public authorities in enacting § 118 of the Civil Rights Act of 1991. That section "encourages" the use of arbitration to resolve civil rights claims where "appropriate." But the legislative history makes explicit that a pre-dispute commitment to arbitrate, extracted as a condition of employment, is *not* appropriate within the meaning of the statute.

The text of § 118 appeared *verbatim* in the Civil Rights Act of 1990, which was adopted by both houses of Congress. The Conference Report, in explaining the effect of the provision, stated: "any agreement to submit disputed issues to arbitration . . . *in an employment contract,* does not preclude the affected person from seeking relief under

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[27] See, e.g., *Cole, supra,* 105 F.3d at 1479. The EEOC has also adopted a formal policy statement declaring the extraction of an agreement to arbitrate statutory discrimination claims as a condition of employment to be "contrary to the fundamental principles evinced in these laws." EEOC Policy Statement on Mandatory Arbitration, No. 915.002 (July 10, 1997, reprinted in 133 Daily Lab. Rep. (BNA) E-4 (July 11, 1997).

[28] That is also the *unanimous* conclusion of the Dunlop Commission—a commission composed of representatives of management, labor, and academia, appointed by the Secretaries of Labor and Commerce to make recommendations respecting labor and employment law. Commission on the Future of Worker-Management Relations, *Report and Recommendations* 33 (December 1994). We have lodged a copy of this document with the Clerk. The National Academy of Arbitrators—the premier academy of labor arbitrators—has recently announced the same conclusion. National Academy of Arbitrators Statement, and Guidelines on Arbitration of Statutory Claims under Employer-Promulgated Systems (May 21, 1997).

the enforcement provisions of Title VII."[29] President Bush vetoed the bill because dissatisfied with others of its provisions, and the bill was reintroduced in 1991 with changes in those other provisions, but with § 118 intact. The two Committee reports in the House in 1991 repeated this same explanation of § 118.[30] (There were no Committee reports in the Senate in 1991). In the debate just prior to enactment of the 1991 bill, Rep. Edwards explained: "The section contemplates the use of voluntary arbitration to resolve specific disputes after they have arisen, not coercive attempts to force employees in advance to forego statutory rights."[31] Nobody in Congress voiced the contrary view, *viz*, that the bill *would* permit preclusive effect to be given to pre-dispute agreements extracted as a condition of employment. Indeed, the "dissenting" members of the House Judiciary Committee, led by Representative Hyde, lamented that § 118 is "nothing but an empty promise" to those who had sought a greater substitution of arbitration for litigation.[32]

The courts below proceeded without even considering the meaning and effect of Title VII in this regard. That, we submit, was clear error with the gravest consequences.

B. Requiring Employees to Pay Substantial Fees as a Precondition to Securing Arbitration

The arbitration agreement Ms. Cosgrove was required to sign provided that if a dispute later arose it would be governed by the rules of the NASD "then in effect." As it developed, those rules required her to pay $1,600 in

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[29] H.R. Conf. Rep. No. 755, 101st Cong., 2d Sess. 26 (1990) (emphasis added). The provision was Section 18 in that bill.

[30] H.R. Rep. No. 102-40, Part I, 102d Cong., 1st Sess. 97 (1991) (House Education and Labor Committee); H.R. Rep. No. 102-40, Part II, 102d Cong., 1st Sess. 41 (1991) (House Judiciary Committee). The provision was Section 216 in the bill as reported by the first committee, and Section 18 in the bill as reported by the second.

[31] 137 Cong. Rec. H9526, 9530 (Nov. 7, 1991).

[32] H.R. Rep. No. 102-40, Part II, supra, at 52, 78.

filing and hearing fees as a precondition to securing arbitration. Nonetheless, the courts below required her to pursue that arbitration and ultimately denied her a judicial forum for her claims.

In a decision rendered one month after the decision below, the D.C. Circuit

> h[e]ld that Cole could not be required to agree to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses. [*Cole, supra*, 105 F.3d at 1485].

The D.C. Circuit in *Cole* reasoned that an employer's imposing as a condition of employment that employees must pay a substantial fee in order to secure an adjudication of their statutory claims is improper, and that this Court did not endorse such an imposed payment in *Gilmer*. 105 F.3d at 1484.

As the issue of paying for the arbitration arises in every case, and the imposition of substantial costs upon employees may discourage the pursuit of legitimate claims,[33] the conflict between the instant case and *Cole* on this issue is obviously of enormous practical significance.

C. Failure to Apprise the Employee That Agreeing to Arbitration Is a Waiver of the Right to a Judicial Forum for Statutory Claims

The requirement that arbitration be a "matter of consent," *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S.Ct. 1212, 1216 (1995), means that employees' waivers of their right to a judicial forum for resolution of statutory claims must be "knowing." *Prudential Insurance Co. v. Lai*, 42 F.3d 1299, 1304-05 (9th Cir. 1994); *Nelson v. Cyprus Bagdad, supra*, 1997 WL 381177 *4. In this case, Ms. Cosgrove testified that she did not realize when she signed the employment application form that she was waiving any right conferred by Title VII. Her

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[33] *Shankle v. B-G Maintenance Management*, 74 FEP Cases 94, 95 (D. Colo. 1997).

unawareness is understandable, for the arbitration clause did not specifically mention that statutory claims were included, did not state that the arbitrators' resolution would be "final and binding" nor convey in any other words that a lay person would understand that later resort to court would be precluded, and did not apprise that she had a right to jury trial that would be waived by signing the form.[34]

In finding a knowing waiver here, the decision below conflicts with decisions of other circuits. The Third Circuit has held that an agreement to mandatory arbitration does not preclude later litigation if it does not state that the arbitration decision will be the final resolution of the dispute. *Orlando v. Interstate Container Corp.*, 100 F.3d 296 (3d Cir. 1996):

> In this case, the employer argues that because the contract makes arbitration mandatory, it must necessarily be final as well. That argument finds support in the policy favoring arbitration as a means of resolving disputes, but fails to meet the requirement of authorization by agreement of the parties. [*Id.* at 300].[35]

In *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977), the Second Circuit refused to find waiver of the right to jury trial when the waiver

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[34] The agreement states that the employee agrees that any controversy arising out of the employment "shall be submitted to arbitration . . . and be resolved in accordance with the rules, then in effect, of [the securities associations]." It further states that "[j]udgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof." The strongest permissible interpretation of this language is that arbitration is an exhaustion requirement, and that if the arbitrators award a remedy it can be enforced in a court proceeding.

[35] *Orlando* involved a dispute between a union and an employer arising under a collective bargaining agreement, and was decided under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. The principle expressed would appear to apply *a fortiori* to a clause drafted by the employer and made a mandatory condition of employment.

appeared explicitly on the face of a lease but was "buried in the eleventh paragraph of [the] fine print, sixteen clause agreement." Here, the entire arbitration provision was buried in the fine print, *but even the fine print did not disclose that there was a right to jury trial or that it would be waived by agreeing to arbitrate.*[36]

The question whether a generic provision calling for arbitration of all disputes "arising out of my employment," when drafted by an employer and imposed as a condition of employment, should be deemed sufficient to apprise employees that they will be foregoing the right to a judicial resolution of *statutory* claims is a difficult and important one. That was an issue of dispute where the arbitration agreement was between *corporations* until this Court's decision in *Mitsubishi, supra;* and it divided this Court 5-3 in that case. And, most employees are *not* advised by counsel in signing contracts of employment and are *not* versed in Supreme Court decisional law. Stretching *Mitsubishi* to this case, as the Sixth Circuit did, ignores reality, and requires this Court's correction.

D. Arbitration Before a Panel of Business Executives

In this case, the employer secured the employee's unwitting assent to arbitrate under terms that yielded a restricted choice of arbitrators, all of whom were currently brokers at other firms in the same city, and all of whom had been until recently executives of local brokerage firms.[37] This is precisely the type of "systematically

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[36] This Court has declared that "as the right of [civil] jury trial is fundamental, courts indulge every reasonable presumption against waiver." *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393 (1937). The lower courts accordingly have "overwhelmingly applied the knowing and voluntary standard" to determine "the validity of a contractual waiver of [civil] jury trial." *KMC Co. v. Irving Trust Co.,* 757 F.2d 752, 756 (9th Cir. 1985).

[37] We say "unwitting," because short of extensive research at the time of her job application Ms. Cosgrove could not have known the composition of the arbitration panels of the organizations whose rules would control the resolution of any statutory claim she later asserted.

disadvantag[ing] employees" against which the D.C. Circuit warned in *Cole*. If the decision below were correct, employers throughout America would be authorized to designate arbitration tribunals consisting exclusively of management colleagues at other firms, to extract agreement to such tribunals as a condition of employment, and to preclude their employees' access to any other forum for the resolution of statutory claims.

The Court in *Gilmer*, noting that the petitioner there was "an experienced businessman," presumed that the parties would jointly select the arbitrators—" '[w]e decline to indulge the presumption that the parties and the arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators' "[38]—and noted that the arbitration rules of the NYSE "provide protections against biased panels."[39] The Court added: "There has been no showing in this case that those provisions are inadequate to guard against potential bias." 500 U.S. at 31. Here, there is such a showing.

Subsequent to the decision below, the D.C. Circuit declared: "an employee cannot be required as a condition of employment to waive access to a *neutral* forum in which statutory employment discrimination claims may be heard." *Cole*, 105 F.3d at 1482 (emphasis supplied).[40] The decision below conflicts with the *Cole* standard.

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[38] *Gilmer*, 500 U.S. at 30, quoting *Mitsubishi*, *supra*, 473 U.S. at 634.

[39] *Ibid.*

[40] The Dunlop Commission, *supra*, n. 28, found "a high degree of of consensus, including among employer groups," that the minimal quality standards necessary to enure the effective protection of employee statutory rights in arbitration includes that "[n]either party should be able to limit the roster unilaterally so as to risk the possibilty that the arbitrator finally selected will be biased in favor of one side." *Report and Recommendations*, p. 31.

E. Arbitration Awards That Do Not Explain the Basis for the Resolution of the Statutory Claim

In *Gilmer*, this Court was dealing with arbitration under a stock exchange rule requiring that "all arbitration awards . . . contain . . . a description of the award issued." The Court cited this rule to refute the arguments of the petitioner in that case that the absence of a written award would produce "a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law." 500 U.S. at 31. In the instant arbitration, after describing the parties' respective contentions, the panel proffered no explanation of its decision to dismiss Ms. Cosgrove's claims. The absence of any explanation for the arbitration decision raises two issues of paramount public concern.

First, this Court has construed the FAA to mean that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient *to ensure that arbitrators comply with the requirements of the statute* [at issue]." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (emphasis supplied), quoted in *Gilmer*, 500 U.S. at 32 n.4. In *Cole*, the D.C. Circuit held that an arbitration agreement that precluded "meaningful judicial review" of the ensuing award would be "unconscionable" and "unenforceable," 105 F.3d at 1487. Perforce, an award that is silent as to its basis is incapable of being meaningfully reviewed to determine whether the arbitrators have conformed to the requirements of the statute. That silence is particularly troublesome in this case, where the arbitrators all were recent business executives with no expertise in employment discrimination law, the NASD had instructed them that they "are not strictly bound by case precedent or statutory law," [41] and their decision adverse to the employee came after a probable cause finding by a state commission.

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[41] *The Arbitrators Manual* of the Security Industry Conference on Arbitration provides, at pp. 19-20, that arbitrators "are not

Second, if arbitrators need not explain their decisions, there is serious danger that the deterrent effect of the statute will be defeated. In *McKennon v. Nashville Banner Pub. Co.*, 115 S.Ct. 879, 885 (1995), this Court had occasion to remind of the importance that public litigation plays in the vindication of that purpose. In *Gilmer*, this Court expressed confidence that this interest would not be defeated, because "it is unlikely that all or even most ADEA claimants will be subject to arbitration." 500 U.S. at 32. That will likely be true if the holding in *Gilmer* is found inapplicable to agreements to arbitrate contained in contracts of employment (see Part I, supra), or limited to contracts negotiated by "experienced businessmen." But there is no reason to think it would be true if the decision below were the law. As a 1994 news article reported, "[m]ore and more companies are requiring their employees to submit claims of discrimination . . . to binding arbitration," other companies "are considering putting similar policies into effect," and "[s]cores of other companies are waiting on the sidelines to see how . . . the Supreme Court will deal with the issue." [42]

CONCLUSION

For the reasons set forth hereinabove, the petition for writ of certiorari should be granted.

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strictly bound by case precedent or statutory law. Rather, they are guided in their analysis by the underlying policies of the law and are given wide latitude in their interpretation of legal concepts." This Manual was attached as an appendix to the Brief of Amicus Curiae National Employment Lawyers Association in the court below, and highlighted in the argument section of that brief at pp. 2, 7.

[42] Steven A. Holmes, *Some Workers Lose Right To Suit for Bias At Work: Arbitration Is Required*, New York Times, March 17, 1994, page A-1. See also, Leslie Kaufman and Anne Underwood, *Sign or Hit the Street: Want a Job? More and More Employers Require Workers To Agree Not To Take Them to Court*, Newsweek, June 30, 1997, page 48 ("a growing list of employers . . . make the court-for-arbitration trade-off a condition of employment.")

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APPENDICES

APPENDICES

APPENDIX A

[Filed Jan. 6, 1997]

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 95-3432

CLAUDIA COSGROVE,
Plaintiff-Appellant,
v.

SHEARSON LEHMAN BROTHERS,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio

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OPINION

BEFORE: WELLFORD, NORRIS, and DAUGHTREY, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Plaintiff, Claudia Cosgrove, was employed as a sales assistant by defendant, Shearson Lehman Brothers. When she initially applied for a job with the firm, she signed an employment application which included the following clause:

> I hereby agree that any controversy arising out of or in connection with my compensation, employment or termination of employment shall be submitted to arbitration before the National Association of Securities Dealers, Inc., the New York Stock Exchange, Inc. or the American Stock Exchange Inc. and be resolved

> in accordance with the rules, then in effect, of such entities.

In 1992, plaintiff filed a suit in federal district court alleging sexual harassment and retaliation in violation of Title VII, as well as state law claims for retaliation and intentional infliction of emotional distress. The district court granted defendant's motion to stay the matter pending arbitration, and a three-arbitrator panel subsequently dismissed plaintiff's claims in their entitrety.

After the arbitration proceedings were concluded, plaintiff returned to the federal district court and filed a motion seeking relief from the stay and requesting that a trial date be set. The district court denied this motion and, instead, granted defendant's cross-motion for enforcement of the arbitration award. This timely appeal followed.

Plaintiff initially contends that employment contract disputes, like that presented in the instant case, are not subject to the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* The Act provides that arbitration provisions in any "contract evidencing a transaction involving commerce" are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. However, Section 1 of the Act provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. Over the years, there has been some controversy regarding whether the phrase "any other class of workers engaged in foreign or interstate commerce" should be read broadly to exempt virtually all employment contracts from the provisions of the Act, or narrowly, so as to exclude from coverage only employment contracts of workers personally engaged in the movement of goods in interstate commerce. In *Asplundh Tree Expert Co. v. Bates,* 71 F.3d 592 (6th Cir. 1995), this court resolved the issue in favor of the latter interpretation. The court held that

> the exclusionary clause of § 1 of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are.

Id. at 600-01. Other circuits have reached the same conclusion. *See Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971); *Pietro Scalzitti Co. v. International Union of Operating Engineers, Local No. 150*, 351 F.2d 576 (7th Cir. 1965); *Signal-Stat. Corp. v. Local 475, United Elec. Radio & Mach. Workers of America*, 235 F.2d 298 (2d Cir. 1956); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of America, Local 437*, 207 F.2d 450 (3d Cir. 1953). Thus, since plaintiff was not engaged in the movement of goods in interstate commerce in the same manner in which seamen or railroad workers are, disputes related to her employment contract with defendant are subject to the provisions of the Federal Arbitration Act.

Likewise, the fact that some of plaintiff's claims are based upon Title VII, a federal civil rights statute, does not affect the enforceability of the arbitration agreement. It is well-settled that statutory claims may be the subject of an arbitration agreement enforceable under the Federal Arbitration Act. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). The United States Supreme Court has recognized that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). While recognizing that all statutory claims may not be appropriate for arbitration, the Court has held that "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at

issue." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

In *Gilmer*, the Court considered whether claims arising under another federal civil rights statute, the Age Discrimination in Employment Act (ADEA), could be the subject of an enforceable arbitration agreement. The Court concluded that there was no evidence of a congressional intent to preclude arbitration of ADEA claims and allowed enforcement of an agreement to arbitrate such claims. *Gilmer*, 500 U.S. at 35. The court subsequently found the reasoning in *Gilmer* equally applicable to the arbitration of claims arising under Title VII. *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 310 (6th Cir. 1991). Thus, plaintiff's claims were properly resolved under the terms of the arbitration agreement she signed unless such traditional grounds for revocation of a contract as fraud or duress are present. *See* 9 U.S.C. § 2. Since we see no indication in the record of the presence of such defects in the execution of the agreement, we conclude that the district court properly enforced the arbitration award.

Plaintiff suggests that this court should adopt the standard articulated by the Ninth Circuit in *Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995). The court in that case held that an arbitration agreement was unenforceable where the Title VII plaintiff did not "knowingly" enter into an agreement to arbitrate employment disputes. *Id.* at 1305. However, this case is clearly distinguishable from *Lai*. The decision in *Lai* was based largely upon the language of the arbitration clause at issue, which "did not purport to describe the types of disputes that were to be subject to arbitration" and "did not even refer to employment disputes." *Id.* at 1305. In contrast, the arbitration agreement executed by plaintiff specifically refers to arbitration of "any controversy raising out of or in connection with my compensation, employment or termination of employment." Thus, the plain language of the agreement

at issue here makes clear that all employment disputes are to be resolved through arbitration. Furthermore, this was the second time that plaintiff had signed such an agreement. Accordingly, her claims were properly submitted to arbitration, and the district court properly enforced the arbitration award.

The order of the district court is *affirmed*.

MARTHA CRAIG DAUGHTREY, Circuit Judge, concurring in part and dissenting in part. The principle is now established in our jurisprudence that courts should give effect, where possible, to the "liberal federal policy favoring arbitration agreements." *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). For that reason, I concur in the majority's conclusions that Cosgrove's employment contract dispute with Shearson Lehman Brothers is potentially subject to arbitration, *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995), and that even Title VII claims may, in appropriate situations, be contractually restricted to an arbitral forum, *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 309 (6th Cir. 1991). I respectfully dissent, however, from the majority's implication that only evidence of fraud or duress will support exercise of federal court jurisdiction over Title VII claims in the face of an agreement to arbitrate "any controversy arising out of or in connection with . . . compensation, employment or termination of employment."

As we held in *Willis,* Title VII does not preclude an arbitral forum from handling claims made under that statute *"if a party agrees to submit all statutory claims to arbitration." Id.* (emphasis added). It is essential, however, that such an *agreement* in fact be reached. Consequently, for an employment contract like the one at issue here to be enforceable, all signatories to it must be aware that statutory and constitutional claims, as well as contractual ones, are subject to arbitration.

In determining in other contract cases whether the required meeting of the minds has occurred, courts have highlighted the level of business acumen of the litigants. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) (recognizing that Gilmer was "an experienced businessman"); *Asplundh Tree Expert Co.*, 71 F.3d at 602 (noting that "the arbitration clause is

contained in an employment contract between a highly paid executive and his corporate employer"); *General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1099 (6th Cir. 1994) (taking judicial notice "that GE is a sophisticated party that is used to dealing with complex international business transactions"). Here, by contrast, the arbitration "agreement" was not a bargained-for result of discussions between equally astute business entities. Instead, the "agreement" concerning an evolving and confusing area of the law was presented to Cosgrove in a "take-it-or-leave-it" posture in a seemingly non-negotiable application for employment.

In such a situation, it is incumbent upon the judiciary to ensure that employees are not unwittingly stripped of opportunities Congress has seen fit to afford them in the presentation of employment discrimination claims. I would, therefore, REMAND this matter to the district court for a finding of whether Cosgrove was indeed aware that she would be waiving her right to bring a Title VII action in federal court merely by applying for a job with Shearson Lehman Brothers.

APPENDIX B

[Filed Mar. 19, 1997]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 95-3432

CLAUDIA COSGROVE,
Plaintiff-Appellant,

v.

SHEARSON LEHMAN BROTHERS,
Defendant-Appellee.

ORDER

BEFORE: WELLFORD, NORRIS, and DAUGHTREY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Daughtrey would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX C

[Filed Mar. 13, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C1-92-860
Judge Beckwith

CLAUDIA COSGROVE,
Plaintiff,

v.

SHEARSON, LEHMAN BROTHERS,
Defendant.

OPINION AND ORDER

This matter is before the Court on Plaintiff's Motion for Relief from Stay and to Set Matter for Trial, and on Defendant's Cross-Motion to Enforce the Arbitration Award. In addition, Plaintiff has filed a Motion to File Supplemental Authority which is hereby GRANTED. For the reasons set forth below, Plaintiff's Motion for Relief from Stay and to Set Matter for Trial is DENIED and Defendant's Cross-Motion to Enforce the Arbitration Award is GRANTED.

Background

Plaintiff ("Cosgrove") filed her original Complaint with this Court on October 30, 1992, and the case was placed on the docket of the Honorable Carl Rubin. At issue was the enforceability of a written agreement to arbitrate

all disputes between Defendant ("Shearson") and Cosgrove, arising out of Cosgrove's employment. The agreement was contained in an employment application which Cosgrove signed before being hired as a Sales Assistant by Shearson. The question was extensively briefed by counsel on both sides, and on February 11, 1993 Judge Rubin issued an order ruling that the dispute was indeed arbitrable, and directing the parties to proceed to arbitration promptly in accordance with the terms of their agreement. The case was subsequently transferred to this Court's docket from the docket of Judge Rubin on March 15, 1993.

Arbitration was held before a three-member panel of arbitrators assembled by the National Association of Securities Dealers ("NASD") pursuant to the provisions of the employment application signed by Plaintiff. The panel reached its decision in the matter on January 18, 1994, concluding that the Statement of Claim was to be dismissed in its entirety and assigning each party to bear its respective costs in the action.

Plaintiff Cosgrove now moves the Court to set aside a date for trial of the same issues addressed by the arbitration panel, and Defendant, conversely, has submitted a cross-motion for enforcement of the panel's decision.

Analysis

A. Arbitrability Claims

Cosgrove bases her arguments in favor of trial before this Court, broadly speaking, on two grounds. The first ground is a reassertion of the position she vigorously argued prior to Judge Rubin's ruling. The thrust of Cosgrove's argument was that the law authorized her to seek recovery in federal court despite the agreement to arbitrate, which either 1) by its terms did not apply to statutory civil rights claims, or 2) was not binding in cases of

Title VII civil rights claims under the *Gardner-Denver* line of Supreme Court jurisprudence. *Alexander v. Gardner-Denver,* 415 U.S. 36 (1974) (holding that an agreement to arbitrate in a collective bargaining setting did not preclude an individual employee from litigating statutory civil rights claims in federal court). The Court, however, considers the enforceability of the agreement to arbitrate to have been resolved by Judge Rubin's Order and declines to revisit the issue here.

Plaintiff Cosgrove also renews her argument that the agreement to arbitrate was unenforceable because she did not knowingly and voluntarily waive her right to trial on Title VII claims. Cosgrove offers a recent case, *Prudential Insurance Co. v. Lai,* 42 F.3d 1299 (9th Cir. 1994), in support of this position. On facts similar to the ones presented by this case, the court in *Prudential* found that plaintiff had not knowingly and voluntarily waived the right to litigate her statutory civil rights claims. This Court is neither bound by decisions of the Ninth Circuit, nor persuaded that *Prudential* represents jurisprudence consistent with *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991). For those reasons and because Judge Rubin's February 11, 1993 Order, which included consideration of waiver arguments, resolved the issue of arbitrability, the Court remains unswayed by Plaintiff's eleventh-hour case law.

B. Defective Arbitration Claims

Cosgrove's second ground consists of alleged defects in her own arbitration hearing which, she contends, render the arbitrators' decision unenforceable. These new allegations have arisen subsequent to the arbitration hearing, were not ruled upon by Judge Rubin, and are therefore properly before the Court at this juncture in the proceedings. Further, their resolution is a prerequisite to a ruling on Shearson's cross-motion for enforcement of the arbitration panel's decision.

The allegations of defectiveness themselves fall into two categories. The first category includes allegations of inherent defects in the NASD arbitration process. Cosgrove alleges that the process, as currently operated, is fatally flawed in at least three different ways: 1) The overwhelming majority of NASD arbitrators are alleged to be white, male stockbrokers, or former stockbrokers, who average approximately 60 (sixty) years of age. As such, Cosgrove contends that they will be less able to acknowledge, understand, or sympathize with the concerns of women who make allegations of sexual harassment against their employers. 2) Because they are stockbrokers and former stockbrokers, the NASD arbitrators are most susceptible to bias in favor of employers who, for the arbitrators, consist of former colleagues, friends, and mentors. 3) The NASD arbitrators are not chosen for their expertise in the area of civil rights law, they are chosen for their familiarity with the industry and its practices. Because their sphere of competence includes the law of the shop but not the law of the land, Cosgrove alleges that the arbitrators are incompetent to judge the validity of claims brought under United States statutory civil rights law.

The second category of defect raised by Cosgrove consists of allegations that her own hearing was tainted by improprieties that should render the award unenforceable. She contends that one arbitrator's non-disclosure of a potential conflict, and the panel's failure to provide a written opinion outlining their findings and their reasoning, constitute defects sufficiently harmful that the Court should vacate the arbitrators' award.

Applicable Law

A. Manifest Disregard

The United States Supreme Court has expressed a strong federal judicial policy favoring arbitration of disputes.

> The Court in *Alexander v. Gardner-Denver Co.*, also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That 'mistrust of the arbitral process,' however, has been undermined by our recent arbitration decisions. '[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.'

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 34 n.5 (1991) (quoting *Shearson/American Express v. McMahon*, 482 U.S. 220, 231-32 (1987), and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-627 (1985)) (citations omitted). *See also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36-38 (1987); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983).

If arbitration is to serve its tandem purpose of speed and economy in the resolution of disputes, it cannot be reduced to a hollow process in which participants simply go through the motions as a prelude to trial. In recognition of this simple fact, courts have widely held that "the standard of review in arbitration cases is very narrow." *Federated Dept. Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862, 866 (6th Cir. 1990), (quoting *Dobbs, Inc. v. Local No. 614, Int'l Bhd. of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987)). Once a dispute has been arbitrated, the findings of the arbitrator will only be vacated on procedural grounds under the Federal Arbitration Act ("FAA") or the applicable state statute, or on the substantive ground known as "manifest disregard" for the law. *Federated*, 894 F.2d at 866; *Health Servs.*, 975 F.2d 1253, 1267 (7th Cir. 1992); *Advest, Inc. v. McCarthy*, 914 F.2d 6, 7 (1st Cir. 1990).

" 'Manifest disregard for the law' means more than a mere error in interpretation or application of the law."

Anaconda Co. v. District Lodge No. 27 of the Int'l Assoc. of Machinists and Aerospace Workers, 693 F.2d 35, 37-38 (6th Cir. 1982). It has been held that to meet the manifest disregard standard, the party opposing the arbitrators' decision must show not simply that the arbitrators made a mistake in applying the law to the facts, but "that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did." *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *see also Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 149 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995) (to meet the manifest disregard standard a party must show that arbitrators knew the law, understood it correctly, found it applicable, and chose to ignore it).

In this case, Plaintiff Cosgrove has failed to allege any mistake of law on the part of the arbitrators. She has suggested that their factual finding was incorrect and stated that their qualifications were inadequate for interpretation and application of federal civil rights laws, but she has entirely failed to point out to the Court any conduct or statements on the part of any of the arbitrators that would provide the basis for a finding that the decision reached by the panel was in manifest disregard of the law.

The Court is not blind to the existence of considerable confusion in the law regarding distinctions between the character and purpose of arbitration in the various arenas of labor law (collective bargaining), employment law (non-collective bargaining), and commercial law (commercial contracts). Nor is the Court insensitive to the need for clarification on these issues. The Court is confident, however, that either Congress or the Supreme Court will soon undertake the burden of that clarification for the benefit of lower courts and litigants alike. In the meantime, *Gilmer* and the rule of "manifest disregard" are controlling law and will be faithfully applied by this

Court. Accordingly, the Court finds that Cosgrove has not alleged any facts which could be construed as constituting manifest disregard of the law.

B. Statutory Defects

Under both the FAA and the Ohio Arbitration Act, arbitral awards may be vacated only under the following limited circumstances:

1. Where the award was procured by corruption, fraud, or undue means.
2. Where there was evident partiality or corruption in the arbitrators, or either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party had been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a); O.R.C. § 2711.10.

1. Demographic Imbalance of Panel

Though Plaintiff Cosgrove did not specifically state the violation she alleged in her objection to the demographic composition of her panel and the pool of arbitrators offered by the NASD, the Court believes her charge can only fit into the statutory scheme as an allegation of evident partially.

Cosgrove has failed, however, to allege any statements or conduct which would indicate a relationship between the arbitrators' race, age or gender, and their ability to perform their duties impartially and conscientiously. Nor has the Court found any indication that a demographic imbalance has ever been held to invalidate an arbitration

panel or vacate its award on grounds that the imbalance constituted evident partiality. Plaintiff has also failed to direct the Court's attention to any case law or other authority that recommends such a conclusion. On the contrary, the Supreme Court has clearly articulated the opposite inclination. In *Gilmer*, the Supreme Court flatly stated that it will not "indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Gilmer*, 500 U.S. at 30, (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985)).

As inclined as this Court is to prefer balance in every aspect of dispute resolution, judicial and extra-judicial alike, a presumption of bias based solely on indicia such as race, gender, age and profession strikes the Court as an evil at least as insidious as the one Plaintiff seeks to remedy. Accordingly, the Court refuses to indulge the presumption that members of certain age, gender, racial and professional groups are prima facie unfit to serve as arbitrators. In the absence of such a presumption, Cosgrove's unsupported allegation has no force.

2. Non-disclosure

Cosgrove also points to the non-disclosure of a potential conflict on the part of one of the arbitrators, Scott Litwin, as a ground for vacating the arbitral award. She alleges that Mr. Litwin was "involved in probate litigation in which he questioned a distribution authorized by Marvin Kraus, partner in Tobias, Kraus & Torchia, who represented the estate of Mr. Litwin's father." (Motion for Relief from Stay at 20.) Plaintiff Cosgrove contends that the failure of arbitrator Litwin to disclose prior contact between Mr. Litwin and a partner in Plaintiff's counsel's law firm, is a defect in the arbitration process that should render it ineffective. The Court does not agree.

This is a clearer allegation of evident partially than Cosgrove's first, but it too, must fail. An arbitrator is not

a judge and is not subject to the same stringent recusal requirements. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 148 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 903 (1995); *Health Servs. Management Corp.*, 975 F.2d 1253, 1264 (7th Cir. 1992). A party alleging evident partiality in an arbitration proceeding must show more than simple appearance of impropriety. *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989), *cert. denied*, 495 U.S. 947 (1990); *Health Servs.*, 975 F.2d at 1264. In the Sixth Circuit, "evident partiality 'will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.' " *Apperson*, at 1358 (quoting *Morelite Const. Corp. v. New York City District Council Carpenters Benefit Fund*, 748 F.2d 79, 84 (2d Cir. 1984)).

Cosgrove has identified only a possibility of animosity between Mr. Litwin and Plaintiff's counsel which amounts, at most, to an appearance of impropriety. She does not offer any specific conduct which would suggest actual bias on the part of Mr. Litwin, nor does she point to any passage in the transcript which would support her allegation. Finally, Plaintiff Cosgrove has failed to cite any case law to bolster her argument that Mr. Litwin's nondisclosure of the potential conflict rises to the level of evident partiality, or any other of the four statutory grounds for vacating the arbitrators' decision. Such an appearance of impropriety might be sufficient grounds for a judge's recusal, but it is not fatal to the validity of an arbitral award.

3. Incompetence

The Supreme Court has made it very clear, most recently in *Gilmer v. Interstate/Johnson Lane Corp.*, that federal courts will refuse to " 'indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.' " *Gilmer* at 30, (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 634). It is also clear that

arbitrations are not mini-trials, and that arbitrators need not be lawyers, nor even versed in all the provisions of the applicable law, in order to be considered competent.

Cosgrove has not directed the Court's attention to any authority stating a requirement that in order to be considered competent arbitrators must have special training and expertise in specific areas of the law. On the contrary, the Supreme Court has articulated a presumption that arbitrators are competent, and Congress has set out the statutory elements which must be proved in order to overcome the presumption. *See, e.g., Gilmer*, at 30; 9 U.S.C. § 10(a)(1)-(4). The burden of proof is upon the plaintiff to show either manifest disregard or the existence of a 9 U.S.C. § 10(a) impropriety. *See Remmey v. PaineWebber, Inc.*, 32 F.3d at 148-49; *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir. 1993); *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992).

Arbitration is consensual, extra-judicial dispute resolution. It is carried out by persons who are not necessarily legal professionals because it exists as an alternative to the legal system. It is intended to be less expensive and more expeditious than litigation, and it is encouraged by the courts of this land. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *NCR v. SAC-Co.*, No. 94-3031, 1995 U.S. App. LEXIS 453 (6th Cir. Jan. 12, 1995); *Federated Dept. Stores, Inc. v. J.V.B. Indus., Inc.*, 894 F.2d 862 (6th Cir. 1990). Because Plaintiff has offered no evidence that the arbitrators, or any of them, in this case were incompetent under the current law, her contention that the award should be vacated on this ground is not well taken.

4. Unreasoned Opinion

Plaintiff alleges that the unreasoned opinion of the arbitration panel should be taken by this Court as "further

evidence of unfairness." There is, however, no legal duty on the part of arbitrators to issue written opinions justifying their decisions. *Federal,* at 868; *Robbins v. Day,* 954 F.2d 679, 684 (11th Cir. 1992), *cert. denied, Robbins v. PaineWebber, Inc.*, 113 S. Ct. 201 (1992) ("It is well settled that arbitrators are not required to explain an arbitration award and that their silence cannot be used to infer a grounds for vacating the award."); *Atlantic Shores Resort Joint Venture v. Martin,* 731 F. Supp. 1279, 1285 (D.S.C. 1990). Therefore, the Court will not consider the absence of a written opinion as evidence of impropriety in the arbitration process. Plaintiff's argument regarding the absence of a written opinion is not well taken.

Conclusion

Because Plantiff Cosgrove has failed to offer persuasive evidence to the Court that the arbitration panel in this case was invalid in its makeup, incompetent, biased, that it manifestly disregarded the law, or that her arbitration was invalid under any provision of either the FAA or the Ohio Arbitration Act, Plaintiff's Motion for Relief from Stay and to Set Matter for Trial is DENIED.

Many courts, including the United States Supreme Court, have made frequent and unambiguous statements asserting the strong federal policy in favor of agreements to arbitrate, and in favor of enforcement of arbitral decisions. No fatal defect in the instant arbitration has been identified by Plaintiff. Accordingly, Defendant's Cross-Motion to Enforce Arbitration Award is GRANTED and this case is hereby DISMISSED.

IT IS SO ORDERED.

/s/ Sandra S. Beckwith
SANDRA S. BECKWITH
United States District Judge

APPENDIX D

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS

93-01255

In the Matter of the Arbitration Between

Name of Claimant
CLAUDIA COSGROVE

Name of Respondent
SHEARSON LEHMAN BROTHERS, INC.

REPRESENTATION

For Claimant: Sharon Sobers, Esq. of Tobias, Kraus & Torchia.

For Respondent: David K. Montgomery, Esq. of Keating, Muething & Klekamp.

CASE INFORMATION

Statement of Claim filed: March 30, 1993.

Claimant's Submission Agreement signed on: March 23, 1993.

Statement of Answer filed by Respondent, Shearson Lehman Brothers, Inc. on June 10, 1993.

Respondent, Shearson Lehman Brothers, Inc.'s Submission Agreement signed on June 4, 1993.

HEARING INFORMATION

Pre-Hearing Conference: December 2, 1993

Hearing Dates/Sessions: December 6, 1993 - Two Sessions
December 7, 1993 - Two Sessions

Hearing Location: Terrace Hotel - Cincinnati, Ohio

CASE SUMMARY

Claimant alleges that she was employed by Respondent, Shearson Lehman Brothers, Inc. ("Shearson") as a sales assistant for two brokers, Joseph Evelo and Scott Randall. Claimant alleges that she was sexually assaulted by another broker and immediately reported the incident. Claimant alleges that the offending broker was reassigned to another branch, but was eventually returned to the branch where the Claimant was employed.

Claimant alleges that the offending broker was given an office near her desk, and was part of her phone pool. This meant that, at times, Claimant would have to answer his phones. Claimant alleges that she complained to the Branch Manager, Jack Whalen ("Mr. Whalen") and that she spoke to the Human Resources Director. Claimant alleges that in 1991, Respondent refused to give her an annual raise. Claimant alleges that this refusal to give her a raise resulted in a conference call among her, the broker she reported to, Mr. Whalen, the local administrative manager and the Human Resources Director. During the call, she was given the option of staying where she was or having her desk moved. Claimant alleges that she chose to have her desk moved.

Claimant alleges that this move created many problems for her. The desk was in an area of the office some distance away from the broker for whom she worked, there was no one close who could cover her phones while she was away from her desk, the desk was too small to accommodate her computer, files and phone and her files were in a different part of the office. Claimant alleges that

she was asked to move her files which were still in her former area to her new area. Claimant alleges that she was unable to do this because files in her new area needed to be removed to make room for her files. Claimant alleges that she requested that the files be removed, without success. Finally, Claimant alleges that she discovered that her files had been removed from her former area without telling her and that she broke down and accepted a constructive discharge by offering to resign as soon as she could find a job. Claimant alleges that she accepted another position and officially severed her relationship with the Respondent.

Respondent maintains that Claimant was employed as a sales assistant in its downtown Cincinnati branch. Respondents maintains that when Claimant complained that a Shearson Financial Consultant had touched her in an offensive manner, they immediately investigated the allegations. Respondent maintains that the Financial Consultant denied the allegations and maintained that there were no witnesses to the incident and that the Branch Manager, Jack Whalen ordered the Financial Consultant to avoid close contact with the Claimant. Respondent maintains that the Financial Consultant was transferred to another office for unrelated reasons.

Respondent maintains that several months later, the Financial Consultant was transferred back to the branch where the Claimant was employed. Respondent maintains that in response to a letter from the Claimant's attorney complaining of the planned location of the Financial Consultant's office, Mr. Whalen spoke to the Financial Consultant who promised to avoid close contact with the Claimant. Respondent maintains that Mr. Whalen spoke to the Claimant and she indicated that she was satisfied with the Financial Consultant's response, and declined to be moved to another desk.

Respondent maintains that as part of her responsibilities, the Claimant was required to serve as a back-up recep-

tionist for other sales assistants and that she refused to perform this function, since it meant occasionally answering the phone for the Financial Consultant. Respondent maintains that at a meeting to discuss this situation, it was agreed that the Claimant's desk would be moved to another location where she would not have to answer his phone. Claimant indicated that she was comfortable with that.

Respondent maintains that when the Claimant received her annual review, she was informed that any raise was delayed for six months because the Financial Consultants who she supported expressed dissatisfaction with her job performance. Respondent denies that the Claimant was the subject of any retaliation. Respondent maintains that the Claimant expressed satisfaction with her new desk location except for her desk size. Respondent maintains that they gave the Claimant a larger desk. Respondent maintains that several months later, Claimant announced that as soon as she could find another job, she would resign.

RELIEF REQUESTED

Claimant requested damages for back pay, lost fringe benefits, compensatory, emotional and punitive damages, and attorney's fees.

Respondent requested that the arbitration panel find no sexual harassment, no retaliation and no constructive discharge and that the Claimant's claim be dismissed.

AWARD

After considering the pleadings, the testimony and the evidence presented at the hearing, the undersigned arbitrators have decided in full and final resolution of the issues submitted for determination as follows:

1) The Statement of Claim is hereby dismissed in its entirety.

2) Each party shall bear their respective costs of this action, including attorney's fees.

FORUM FEES

Pursuant to Section 44c of the Code of Arbitration Procedure, the following Forum Fees are assessed:

$500.00	Non-refundable filing fee
$300.00	Pre-hearing conference fee
$2,400.00	Hearing session fees (4 sessions x $600.00)

1) Total forum fees in the amount of $3,200.00 are hereby assessed equally between the Claimant and the Respondent.

2) Claimant is therefore assessed the amount of $1,600.00 and is hereby directed to pay that amount with the $1,400.00 previously paid to the NASD, Inc. Claimant is directed to pay the balance of $200.00 to the NASD, Inc.

3) Respondent is hereby assessed the amount of $1,600.00 and is hereby directed to pay that amount to the NASD, Inc.

Concurring Arbitrator's Signature

Name Industry Chairperson

/s/ Wallace E. Sarran, Jr.
WALLACE E. SARRAN, JR.
Date of Decision: January 18, 1994

APPENDIX E

[Filed Feb. 11, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-92-860

CLAUDIA COSGROVE,

Plaintiff,

v.

SHEARSON LEHMAN BROTHERS,

Defendant.

ORDER

This matter is before the Court on Defendant's Motion to Dismiss or to Stay Pending Arbitration (Doc. 4), upon a response thereto by Plaintiff (Doc. 7) and upon a Reply filed by Defendant (Doc. 8). This is an action under Title VII, where a secretarial employee has claimed sexual harassment and retaliation under 42 U.S.C. § 2000e *et seq.* Attached to Document 4 is an Application for Employment signed by Plaintiff which contains the following language:

> I hereby agree that any controversy arising out of or in connection with my compensation, employment or termination of employment shall be submitted to arbitration before the National Association of Security Dealers, Inc., the New York Stock Exchange, Inc., or the American Stock Exchange, Inc. and be resolved in accordance with the rules then in effect of such entities.

There is no doubt that there has been a policy in all courts to defer to arbitration where the parties have so agreed in an effort to expedite resolution of such disputes. The matter at issue is in fact arbitrable. The Court believes that Plaintiff is bound by her agreement.

Accordingly, Defendant's Motion to Dismiss is hereby DENIED, but the Motion to Stay this Matter Pending Arbitration is hereby GRANTED. The parties are directed to proceed to arbitration promptly and to advise the Court on the first of each month beginning March, 1993, of the progress in this matter in arbitrating the issues.

IT IS SO ORDERED.

/s/ Carl B. Rubin
CARL B. RUBIN
United States District Judge

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543-0001

May 14, 1997

Mr. Michael H. Gottesman
Georgetown Univ. Law Center
600 New Jersey Avenue, N.W.
Washington, DC 20001

Re: Claudia Cosgrove
v. Shearson Lehman Brothers
Application No. A-809

Dear Mr. Gottesman:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on May 4, 1997, extended the time to and including July 17, 1997.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER,
Clerk

By /s/ Melissa A. Blalock
MELISSA A. BLALOCK
Assistant Clerk

APPENDIX G

STATUTES INVOLVED

Section 1 of the United States Arbitration Act, 43 Stat. 883 (1925), reenacted without change, 61 Stat. 670 (1947), 9 U.S.C. § 1, provides as follows:

> "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States and with foreign nations, or in any Territory of the United States or in the District of Columbia or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the United States Arbitration Act, 43 Stat. 883 (1925), reenacted without change, 61 Stat. 670 (1947), 9 U.S.C. § 2, provides as follows:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 118 of the Civil Rights Act of 1991, Pub.L. 102-166, Nov. 21, 1991, 105 Stat. 1071, provides as follows:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.